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IN THE

Supreme Court of the United States

October Term, 1958

No. 370

SYLVIA SCHINDLER HOLLAND,
Petitioner,

vs.

NORMAN N. HOLLAND,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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I.

Most conspicuous in respondent's brief is its utter default in answering the petition, both on the law and the facts.

Respondent has not attempted to challenge the factual basis for certiorari, because it is sworn testimony of the very principals involved—Judge Holt, Special Master Prunty, his law partner Thurman A. Whiteside and respondent's counsel, Morton Rothenberg—given before the Investigating Committee of the Florida House of Representatives and the Senate of Florida during Judge Holt's impeachment trial.

Respondent has chosen also to ignore the constitutional question raised below and unequivocally presented by the petition, the denial of due process by the deprivation of a

fair hearing before an impartial tribunal.[1] Instead, he has conjured up a straw question, nowhere urged (i.e., impairment of the obligation of the marriage contract), and has proceeded to knock it down. The question of due process, resting firmly on its foundation of undisputed record facts, remains an uncontested ground for the granting of this petition.

II.

The contention that petitioner's statutory time to appeal or to petition for certiorari has elapsed wholly overlooks the established purpose and nature of bills of review in equity. The relationship *inter se* and unethical practices of Judge Holt, Special Master Prunty, Thurman A. Whiteside and respondent's attorney Rothenberg came to light as the legislative investigation and impeachment proceedings against Judge Holt progressed and were not fully apparent until his impeachment trial before the Florida Senate had been concluded and the transcript of the minutes in both proceedings became available.[2]

Indeed, the circumstances here vividly illustrate the reason why equity has traditionally recognized that, however final a judgment, it is subject to review when evidence of fraud is subsequently discovered. In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944) Mr. Justice Black explained the principle in these words:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect that

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[1] Respondent's reference to "subsequent motions" before Circuit Judge Wiseheart is misleading. (Respondent's Brief, pp. 2-3) Judge Wiseheart, who was Judge Holt's alternate, summarily denied a motion to vacate the decree predicated upon respondent's marriage to his paramour immediately after his divorce from petitioner, in the face of his testimony denying any plan to marry her (R. 2515-2524). Judge Holt was on vacation when an immediate motion was necessary for jurisdictional reasons, prior to the filing of a notice of appeal. The motion was subsequently reargued before Judge Holt and was again denied (R. 2526-2527; 2537).

[2] See petition herein, pp. 7-12

> under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." (322 U. S. at 244).

In the same opinion it was further stated:

> "Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment. * * * But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away." (322 U. S. at 245.)[3]

Respondent's contention[4] that petitioner would not have been successful had she petitioned this Court for certiorari before discovery of the evidence revealed in Judge Holt's impeachment proceedings utterly ignores the basis of petitioner's application. Petitioner predicates her claim of the denial of due process precisely upon that after-discovered evidence. Respondent's assertion that relief is foreclosed because petitioner's time has expired, seeks, in effect, to render this Court impotent in the face of manifest injustice. Ample, unquestioned precedent has rejected his contention.[5]

III.

Respondent's argument that the denial by the Supreme Court of Florida of the petition for leave to file a bill of review was a matter of discretion and therefore not appealable assumes that the label "discretion" confers upon a judicial ruling confiscatory of constitutional rights a badge of immunity from appellate review. Such, of course, is not

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[3] See also the authorities cited on pp. 15-16 of the petition herein.

[4] See pp. 6-7 of Respondent's brief.

[5] *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, *supra*, and authorities therein cited.

the law. Judicial discretion has well recognized limitations and is reversible when such limitations are exceeded. As this Court has stated:

> "When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."[6]

Here denial of the petition for *leave* to file a bill of review, foreclosing any possible review in the Florida courts of the constitutional questions raised by petitioner, was itself so arbitrary and capricious, so totally lacking in "regard to what is right and equitable under the circumstances and the law", that it was not only a clear abuse of discretion but was itself a denial of due process, as urged in the petition herein.[7]

In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, *supra*, where it was found that fraud had been perpetrated upon the lower court, this Court stated:

> "We hold, therefore, that the Circuit Court on the record here presented had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions." (322 U. S. at 249-250).

Here, too, the Supreme Court of Florida had both the duty and the power to permit filing of petitioner's bill of review. The Constitution would indeed be a hollow instrument if rights it guaranteed could be denied as a matter of discretion.

IV.

On October 20, 1958, in *Sangamon Valley Television Corp.* v. *U. S.* and *WIRL Television Corp.* v. *U. S.*, 27 LW 3127 (Nos. 235 and 242, October Term, 1958) this Court

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[6] *Langnes* v. *Green*, 282 U. S. 531, 541 (1931).

[7] Petition, pp. 3, 15.

granted certiorari and vacated judgments of the United States Court of Appeals which had affirmed the assignment of television channels by the Federal Communications Commission, and remanded the cases for appropriate action in view of testimony given before a Congressional Committee concerning improper influence upon members of the Commission when those cases were before it.

Due process demands, at the very least, review of a determination where evidence is discovered demonstrating bias, corruption and improper influence in the tribunal. Here, the Supreme Court of Florida has refused to permit review under those very circumstances.

We urge that certiorari be granted on the record here presented, and we further respectfully submit that, inasmuch as the controlling facts are uncontested and indisputable, this case warrants a judgment of reversal on the petition for certiorari.

Respectfully submitted,

LOUIS NIZER,
Counsel for Petitioner.

October 23, 1958.